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October 14, 1977

The Honorable Robert W. Flanders
State Treasurer
State House Annex
Concord, New Hampshire 03301

Dear Mr. Flanders:

By letter dated August 30, 1977 you asked whether the amendment of RSA 78-A by Chapter 330 of the Laws of 1977 requires that a new distribution formula be applied to the distribution of meals and rooms tax receipts to be made on October 15, 1977. Your letter states that it was your assumption that the distribution formula contained in RSA 78-A:23 prior to the amendment of that section by Chapter 330 should be applied to the distribution to be made on October 15, 1977, and that the new distribution formula in Chapter 330 would not be effective until the October 15, 1978 distribution. While we recognize that there is a strong practical argument favoring your assumption about the effect of Chapter 330, it is our opinion that the new distribution formula set forth in that Chapter must be used in calculating the distribution to be made on October 15, 1977.

In both its original and amended form, RSA 78-A:23 provides the procedures and the formula for the disposition of funds collected under the meals and rooms tax imposed pursuant to RSA 78-A:6. Under those procedures, the Commissioner of the Department of Revenue Administration pays over to the State Treasurer all funds collected under Chapter 78-A for deposit in the "meals and rooms tax fund." See RSA 78-A:23, as amended by 1970 Laws 53:1 and as amended by 1977 Laws 330:3. The Commissioner determines the cost

to administer the tax for the fiscal year ending the preceding June 30 and notifies the State Treasurer of those costs in a certified report filed on or before October 1 of each year. As it existed prior to the amendment by Chapter 330, RSA 78-A:23 provided for disposition of the sums in the tax fund according to the following formula:

On or before October 15 of each year the treasurer shall distribute the net income as follows:

(a) Sixty per cent into the general fund;

(b) Forty percent to the unincorporated places, towns, and cities on a per capita basis at the ratio of the population of the place, town, or city to the population of the state, based on the latest resident population figures furnished by the office of state planning.

Chapter 330 amended the provisions of RSA 78-A in two areas relevant to your inquiry. First, the Chapter increased the rate of tax set out in RSA 78-A:6 for all room charges and for charges for certain meals. Laws 1977, 330:2. The tax on room charges was increased from 5 to 6 percent. The most important change with respect to charges for meals was an increase from 5 to 6 percent in the tax on meals of \$1.00 or more. Id.

Second, the Chapter revised the formula for disposition of net income to provide that:

After deducting the costs of the administration of the chapter from the total income and on or before October 15 of each year, the treasurer shall distribute the net income as follows:

(a) $66\frac{2}{3}$ percent into the general fund;

(b) $33\frac{1}{3}$ percent to the towns and cities.

Laws 1977, 330:3.

Whereas prior to the amendment RSA 78-A:23 had provided for computation of the share of the cities and towns on the basis of population, the amended formula provides for distribution according to:

[A]n equalized formula calculated by taking for each city and town the amount of local property taxes assessed, including current distributions of state revenues to local government, exclusive of education funds; dividing that sum by the local equalized evaluation as determined by the board of taxation; and multiplying the result by the local population to produce an equalizing factor for each city and town. Such equalizing factors shall be added together to produce a total state sum. Each local equalizing factor shall be divided by the total state sum to produce for each city and town a normalized factor. Each such normalized factor shall be multiplied by the total amount of revenue to be shared by the cities and towns to produce the annual share for each city or town. Provided, however, that no city or town shall receive under the provisions of this section an amount less than its 1976 distribution under this section. The funds of any such adjustment shall be provided by a pro rata reduction in the amounts distributed to those cities and towns otherwise receiving more than the 1976 distribution. Laws 1977, 330:3 (emphasis added).

Laws 1977, 330:5 provides that the Chapter "shall take effect July 1, 1977." The question raised in your letter results from the fact that while the Act specifically provides that the increased rate of tax is not to be applied to meals and occupancies which were "sold or contracted for prior to July 1, 1977," (Laws 1977, 330:4) the Chapter contains no special effective date for the distribution formula. Since the distribution on October 15, 1977 is to be made after the effective date of Chapter 330, and since there is no saving clause in the Chapter, it would appear on the face of the amended statute that the new distribution formula is applicable to all distributions made after July 1, 1977. This is also our considered legal judgment.

We have not found your question to be without its difficulties, however, in spite of the unambiguous language of Chapter 330. The most obvious problem caused by the

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effective date of the Chapter, and of the distribution formula, is that the proviso in Section 3 of Chapter 330 (see underscored language above) cannot be fulfilled if only 33-1/3 percent of the fiscal 1977 meals and rooms tax fund is distributed to the cities and towns. According to figures provided by your office, the fund to be distributed on October 15, 1977, amounts to some 16.1 million dollars (after deduction of expenses). Forty percent of that fund is approximately 6.47 million dollars. Distribution of 33-1/3 percent of the fund to the cities and towns would return only 5.39 million dollars. You have also informed us, however, that the 1976 distribution to the cities and towns was approximately 5.56 million dollars. Application of the new distribution formula as required by the new Chapter therefore provides the cities and towns with less revenue than they received in the 1976 distribution, contrary to the terms of the proviso. Furthermore, since the application of the 33-1/3 percent figure to the fiscal 1977 fund will result in a smaller total distribution than in 1976, it will be impossible to resolve the problem of a reduced distribution by the method provided in Chapter 330, i.e., a "pro rata reduction in the amounts distributed to those cities and towns otherwise receiving more than the 1976 distribution." Laws 1977, 330:3. In the absence of an appropriation by the legislature for the purpose of increasing the 1977 distribution of each city and town to the 1976 level, the conditions of the proviso cannot be met; however, no such appropriation has been made.

The legislature could not have been aware of the actual figures mentioned above. It might have anticipated, however, that the proviso could not be fulfilled by distributing nearly 7 percent less of the fiscal 1977 fund to the cities and towns unless there was a substantial increase in the revenue collected in that fiscal year. If it had been aware of these figures, it probably would have postponed the effective date of the new distribution formula until October 15, 1978, so that the formula would be applied to the higher tax rate imposed during fiscal 1978. See Laws 1977, 330:2. Frankly, we would have expected that this would be done; but there is no indication of this postponement in the actual language of the statute.

In addition to the inability to fulfill the proviso, there are two other reasons why a delay in the application of the distribution formula might have been expected. First, the delay would have had the effect of giving the State the entire increase provided by the new

tax rate while leaving unchanged the two cent return to cities and towns on each dollar of taxable meals and rooms, i.e., 40 percent of five cents per dollar under the former RSA 78-A:23 and 33-1/3 percent of six cents per dollar under the amended section. Although there is almost no legislative history on Chapter 330, there is a recognition in the Reports of the House Ways and Means Committee that the purpose of the bill which became Chapter 330 was to leave payment to the towns the same while giving the state the extra penny of taxation which would result from the increase of the tax from five to six cents per dollar and the readjustment of the distribution formula. See House Record, April 20, 1977, at 1331. The effect of making the adjusted distribution formula effective to the fiscal 1977 fund is that during this year only, the cities and towns will receive less than two cents on each dollar of taxable meals and rooms charges. This result would seem to be directly contrary to the Report of the House Ways and Means Committee. Id.

The second reason why the postponement of the application of the formula might have been expected is that the formula to be applied on October 15, 1977 is applied to sums collected for the fiscal year ending June 30, 1977. Although there is no logical relationship between the formula for disposition in RSA 78-A:23 and the rate of tax imposed by RSA 78-A:6, there is a practical relationship. This practical relationship is given recognition in the fact that the cities and towns plan their budgets on the basis of the receipt of a percentage of the fund collected at a given rate. Although the cities and towns have no vested entitlement to a fixed percentage of the fund, a change in percentages may have a detrimental effect on their planning for the past year.

The problems caused by the application of the new distribution formula to the October 15, 1977 distribution might be said to support a legislative intent or purpose to delay operation of the formula. Yet in spite of these problems, we cannot interpret Chapter 330 in a manner which does violence to its express language. It is an established rule of statutory construction that even where the purposes of the legislature seem obvious, such purposes cannot be recognized in the face of clear language to the contrary. In Trustees of Phillips Exeter Academy v. Exeter, 92 N.H. 473 (1943), the Supreme Court of New Hampshire adopted this rule in rejecting an argument by the Academy that a statutory amendment which on its face was applicable to the Academy did not apply:

One position taken by the plaintiffs is that "the obvious intent of the legislature was to prevent fly-by-night private schools from enjoying the exemption." The difficulty with this position is that, conceding the intent, the language used does not manifest it. The language embraces all private educational institutions with no exceptions. However foolish and arbitrary the amendment may be thought to be in application to institutions of such high standing and permanence as the Academy, the legislative will is to be found in the enacted expression of it. The ascertainment of actual intent or oversight, in conflict with the expressed intent, cannot prevail as a method and rule of judicial construction. While as between a reasonable and unreasonable meaning of the language used, the reasonable meaning is to be adopted, yet if the language is clear in having only one meaning, it must be adopted, however unreasonable it may be in its applications or in some of them. The courts have no function of redrafting legislation in order to make it conformable to an intention not fairly expressed in it. The amendment as it reads is unqualified, and relief from its inappropriateness, incongruity and obduracy must be sought through further legislative action. 92 N.H. at 478.

In the instant case, the language used by the legislature in making the new distribution formula effective on July 1, 1977 is equally unambiguous. We are therefore forced to conclude (albeit somewhat reluctantly in light of the problems discussed above) that a result similar to that reached in the Phillips Exeter case must be reached here, i.e., the plain meaning of the language used by the legislature must be followed. This conclusion is supported by the fact that the legislature did see fit to adopt a saving clause pertaining to certain rooms and meals subject to contracts made before July 1. It is clear, therefore, that the legislature was aware of certain problems concerning the effective date of the statute. Given that awareness, the fact that it did not see fit to adopt a similar provision with respect to the formula may not have been purposeful, but neither can a contrary conclusion be implied.

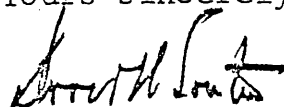
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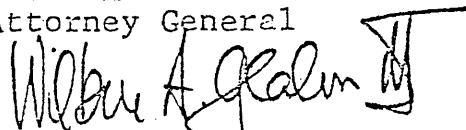
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One final observation is useful. We do not believe that this is an instance in which the application of the plain language of the statute provides an absurd result. cf. State v. Woodman, 114 N.H. 497 (1974). Although one section of the statute--the effective date of the distribution formula--prevents compliance with the proviso contained in another section, this may be so only because the legislature has not seen fit to appropriate the sums necessary to fund the proviso. Although no absurd result requiring a different interpretation of the statute has been reached, it would also be perfectly appropriate for you to ask the legislature for the funds necessary to comply with the proviso or alternatively, for a deferral of the effective date of the new distribution formula until October 15, 1978.

Yours sincerely,



David H. Souter
Attorney General



Wilbur A. Glahn, III
Assistant Attorney General
Division of Legal Counsel

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